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Supreme Court, U.S.
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No. 95-1512

In The

Supreme Court of the United States

October Term, 1995

MICHAEL TOTEMOFF,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Alaska Supreme Court

BRIEF FOR THE STATE OF ALASKA IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Alaska Supreme Court decision below conflicts with Ninth Circuit decisions in holding that in passing title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111 - 3126, Congress did not intend to preclude state enforcement of nonconflicting state law governing hunting on public lands, when the Ninth Circuit has never addressed the issue.

Whether the Alaska Supreme Court decision below conflicts with Ninth Circuit decisions as to the defenses available to a rural resident under title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111 - 3126, when title VIII does not protect the type of activity the defendant wished to raise as a defense in this case and thus the defense would not have been permitted in federal court.

Whether the Alaska Supreme Court was correct in determining that the term "public lands" in the Alaska National Interest Lands Conservation Act does not include navigable waters in which the federal government possesses reserved water rights, so that the traditional state management of important fisheries in such waters is not preempted by federal officials, a determination contradicted by a decision of the Court of Appeals for the Ninth Circuit.

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STATEMENT OF THE CASE

This case stems from activity the trial judge described as "a mechanized operation off a big fishing boat . . . where the people are going out on motor boats and spotlighting deer at night from the beaches." Pet. App. 74. Mr. Totemoff was convicted of violating a state regulation that prohibits hunting with the aid of lights, an activity prohibited in Alaska since 1938. A nearly identical federal regulation also prohibits spotlighting.

On December 27, 1990, three Alaska Fish and Wildlife Protection officers patrolled Prince William Sound by boat in response to complaints of spotlighting activity. Just before 10 p.m., the officers saw a small skiff along Story Island scanning the shore with a spotlight. The officers followed and watched it skirt several islands while spotlighting the beaches. They saw the skiff concentrate its light on a beach on Naked Island. A man stood on the bow of the skiff, ran up the beach into the brush and disappeared for a few seconds, then returned more slowly to the skiff. The officers also saw a second man. They approached the men and found them standing over two freshly-gutted deer carcasses. One of the men was Mike Totemoff, a rural Alaskan resident, who admitted shooting one of the deer. The skiff contained three more deer carcasses. The men had brought the skiff from a fishing vessel anchored nearby, which also contained three deer carcasses.

Although the deer hunting season had opened August 1, Mr. Totemoff was hunting in December. Spotlighting is most effective in winter, when hungry deer come down to the beach to eat kelp, and in the dark,

when a spotlight most effectively "freezes" the animal. The bag limit for the season was five deer. 5 AAC 82.030 (1990).

Mr. Totemoff pleaded not guilty to using unlawful methods of taking game by spotlight, in violation of 5 AAC 92.080(7) (1990). He moved to dismiss, asserting lack of state jurisdiction and invalidity of the regulation under which he was charged. The court denied the motion to dismiss, and a jury found him guilty. He appealed to the Alaska Court of Appeals, which upheld his conviction. *Totemoff v. State*, 866 P.2d 125 (Alaska App. 1993). The Alaska Supreme Court granted his petition for hearing and issued a decision on August 7, 1995 and a corrected decision on October 20, 1995. *Totemoff v. State*, 905 P.2d 954 (Alaska 1995).

REASONS FOR DENYING THE WRIT

Contrary to Mr. Totemoff's assertions, the Alaska Supreme Court decision in this case does not conflict with Ninth Circuit decisions on the issue of whether ANILCA preempts state enforcement of state laws. The decision also does not create a conflict as to the defenses available in an enforcement action against a rural resident. Mr. Totemoff is correct, however, that the decision below conflicts with a Ninth Circuit decision as to whether the state or the Secretaries of Agriculture and Interior have authority to regulate subsistence activities on navigable waters. *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). The state has requested that the Court consider the issue in its petition for certiorari in *Babbitt*, No. 95-1084. If the Court

has denied that petition, it should grant Mr. Totemoff's petition on this issue only.

I. THE NINTH CIRCUIT AND THE ALASKA SUPREME COURT HAVE NOT ISSUED CONFLICTING DECISIONS ON ANILCA'S PREEMPTIVE EFFECT, AND ANILCA DOES NOT PRECLUDE A STATE ROLE IN SUBSISTENCE HUNTING AND FISHING IN ALASKA.

Mr. Totemoff argues that in passing ANILCA, Congress intended a scheme of federal regulation so pervasive as to foreclose the enforcement of state laws on the same subject, and asserts that the Ninth Circuit and the Alaska Supreme Court have directly conflicting decisions on ANILCA's preemptive effect. Pet. 13. Neither ANILCA nor its legislative history indicate that Congress intended title VIII to effect "field" preemption, and the implementing agencies have not interpreted it this way. The Ninth Circuit also has never found title VIII to have this effect.

Mr. Totemoff argues that federal implementation of the subsistence priority precludes state enforcement of its fish and game laws against a rural resident on public lands. Pet. 13. Further, according to Mr. Totemoff, this preemption occurs even when state law clearly applies to the land where the prohibited activity occurred and federal law prohibited the activity as well. While the state agrees that its constitution prohibits it from passing laws granting a priority for hunting and fishing based on residence, *see McDowell v. State*, 785 P.2d 1 (Alaska 1989), ANILCA still accords state law a role on public lands and permits state enforcement of nonconflicting state law.

Mr. Totemoff's argument is based on an incorrect assumption about title VIII – that title VIII mandates a state enforcement program or the federal agencies will adopt one. Title VIII does not mandate any particular implementation program, however. It simply grants a right, requires local input in considering subsistence needs, and leaves the problem of *how* to implement the right to the managing authority, either the state or the federal agencies.

Title VIII grants a priority to rural Alaskan residents for hunting and fishing for subsistence uses on public lands. 16 U.S.C. § 3114. It does not address how the priority should be implemented or enforced. The element of "cooperative federalism" in title VIII that Mr. Totemoff highlights is not actually written in the statute, but courts have interpreted the statute to require the state to pass a law applying the priority to all lands within Alaska or the federal agencies will promulgate regulations to assure the priority, *see, e.g., Native Village of Quinhagak v. United States*, 35 F.3d 388, 390 (9th Cir. 1994).[1] These regulations set seasons, bag limits, and permitted means and methods for customary and traditional uses of fish and game. The state also has regulations governing hunting and fishing seasons, bag limits, and means and methods for state subsistence and sport hunting and fishing, and commercial fishing. Nothing in ANILCA limits the state's

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[1] Title VIII actually provides only that if the state does not provide statewide laws to implement the priority, the Secretary will establish six regional advisory councils, intended generally to give local residents an opportunity to participate in the process of regulating subsistence uses. 16 U.S.C. § 3115.

authority to enforce state laws that do not encroach upon a rural resident's subsistence priority.

The agencies charged with implementing title VIII have not interpreted it as precluding state participation. To the contrary, the agencies' regulations clearly anticipate a state regulation and enforcement role on federal public lands. For example, when the federal agencies proposed regulations to implement the priority, they explained that the regulations would permit the state to continue to participate in the management of subsistence hunting on public land:

> [T]hese regulations anticipate an interactive process between the State fish and game regulatory procedure. The State, because of its constitution, cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. The State can facilitate harvest by rural residents through various regulations dealing with means and methods of take and perhaps other mechanisms. If State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations may closely parallel State regulations. The Federal program anticipates a highly cooperative, interactive relationship with the State system. To the extent that cooperation exists, the Federal program will be able to minimize change to traditional State regulation and management of fish and wildlife.

55 Fed. Reg. 27,114, 27,119 (1990).

Further, the regulations provide that the "State of Alaska fish and wildlife regulations apply to Federal

public lands and such laws are hereby adopted and made a part of these regulations to the extent they are not inconsistent with, or superseded by this part." 36 C.F.R. § 242.14(a) (1995).[2] They provide also that to engage in subsistence hunting on federal public lands, individuals must possess any licenses, permits, harvest tickets, or tags required by the state, unless the Federal Subsistence Board expressly requires federal licensing.[3] 36 C.F.R. § 242.6(a) (1995). The regulations require that any individual not specifically prohibited by federal regulations from hunting or trapping on public lands in a given area follow the appropriate state regulations. 36 C.F.R. § 242.25(j) (1995). The agencies also clearly intended the state to have an enforcement role; the regulations provide that both state and federal enforcement officers may request proof of licensing or other pertinent documents, and that subsistence hunters must allow state or federal law enforcement agents to inspect any apparatus capable of use for hunting or fishing, and any fish or game taken. 36 C.F.R. § 242.6(e) (1995). Thus, the agencies understand that Congress did not intend a scheme of regulation so comprehensive as to exclude all state regulation.

None of the cases Mr. Totemoff cites in support of his "field preemption" argument conflict with the Alaska

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[2] The federal subsistence regulations are duplicated in titles 36 and 50 of the Code of Federal Regulations because they apply to lands administered by both the Department of Agriculture and the Department of Interior. For simplicity, this brief cites only the regulations cited in title 36.

[3] The Secretaries of Agriculture and Interior created the Federal Subsistence Board and delegated it authority to execute their responsibilities under title VIII. 36 C.F.R. § 242.10 (1995).

Supreme Court's decision on this point. The cases hold only that the federal agencies will promulgate regulations to assure that subsistence hunting and fishing take priority over other uses if the state does not pass a law applying the priority to all lands within Alaska. *See, e.g., Native Village of Quinhagak v. United States,* 35 F.3d at 390 ("Alaska's noncompliance with ANILCA made the federal government responsible . . . for implementing ANILCA as to 'public lands.'"). The Alaska Supreme Court acknowledged this and found state law preempted to the extent it conflicts with the federal regulations. Pet. App. 3. The state spotlighting ban itself does not conflict with the federal regulations, as they contain the same prohibition. *See* 36 C.F.R. § 242.25(b)(1)(viii) (1995).

II. THE DECISION BELOW CREATES NO CONFLICT BETWEEN FEDERAL AND STATE COURTS AS TO THE DEFENSES AVAILABLE TO A RURAL SUBSISTENCE HUNTER, AND MR. TOTEMOFF HAD THE SAME RIGHTS IN STATE COURT THAT HE WOULD HAVE RECEIVED IN FEDERAL COURT.

Mr. Totemoff portrays the Alaska Supreme Court decision as conflicting with federal law as to the availability of defenses to a rural Alaskan resident charged with hunting violations. The *Totemoff* decision does not conflict with federal law on this issue. The defense that Mr. Totemoff wanted to present at his trial would have been prohibited in federal court as well.

Mr. Totemoff claims that he was denied an opportunity to present a defense in this case that would have been available in federal court, that spotlighting is a "customary and traditional" subsistence hunting practice.

The Alaska Supreme Court held that ANILCA does not protect "customary and traditional" hunting methods, however. ANILCA precisely defines the activities subject to title VIII's priority in 16 U.S.C. § 3113, and this definition does not include hunting methods. Further, none of the federal cases Mr. Totemoff cites supports his assertion or even addressed the issue.

ANILCA provides that hunting and fishing for subsistence uses by rural residents is accorded priority over hunting and fishing for other purposes. 16 U.S.C. § 3114 (1985). "Subsistence uses" is defined in terms of the uses of the fish and wildlife taken, not in terms of the methods used to take it. *See* 16 U.S.C. § 3113.[4] Spotlighting deer does not constitute a *use* of game subject to the priority; it is a method of taking game. Because ANILCA's priority does not extend to methods, Mr. Totemoff had no right to submit to a jury the factual issue of whether the hunters in Mr. Totemoff's village customarily spotlighted deer.

Given that the statute on its face does not provide any right to use particular hunting methods, the Alaska Supreme Court did not need to consider the legislative history of title VIII. Nevertheless, the legislative history Mr. Totemoff cites does not support his interpretation. He

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[4] 16 U.S.C. § 3113 provides in part:

Definitions: As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption; as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, for barter, or sharing for personal or family consumption; and for customary trade.

cites a House Committee Report explaining that the bill reported did not limit the priority to hunting and fishing by traditional methods. Pet. 24. This assures that the technology of subsistence hunting and fishing can progress as more effective methods develop. The observation that title VIII does not prohibit improved hunting methods does not support the conclusion that title VIII protects any method that a rural resident can establish to be "customary and traditional," however. In this case, Mr. Totemoff wanted to present evidence that several people in his village had spotlighted deer over a period of 20 years, during which spotlighting was illegal.

The federal cases Mr. Totemoff cites do not address the issue of whether ANILCA protects customary hunting and fishing methods and thus do not conflict with the Alaska Supreme Court's interpretation. In *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995), the Ninth Circuit held that a Forest Service plan that predated ANILCA could not rely on its analysis of reasonable alternatives to timber harvest, as required by the National Environmental Policy Act, to meet the requirement of 16 U.S.C. § 3120 that it consider alternatives with less impact on lands used for subsistence purposes. *Id.* at 731. In *Bobby v. Alaska*, 718 F.Supp. 764 (D. Alaska 1989), the court found that in protecting "subsistence uses," ANILCA required the Alaska Board of Game to accommodate a village's tradition of sharing the moose and caribou its residents take. *Id.* at 780-81. Sharing game clearly constitutes a *use* of the game, and thus falls within the definition of 16 U.S.C. § 3113, but the case did not raise or address the issue of whether this section includes methods of taking game.

The other point that Mr. Totemoff asserts as indicative of a conflict between the defenses available in state and federal court was resolved in his favor by the Alaska Supreme Court in this case. The Alaska Supreme Court agreed with *Bobby*'s holding that a defendant has the right to challenge the statute or regulation under which he is charged. Pet. App. 36. Under Alaska law, the claim that a hunter took fish or game for subsistence uses is not a legitimate defense to a criminal charge that an individual was hunting or fishing when no law authorized it. *See State v. Eluska*, 724 P.2d 514 (Alaska 1986); AS 16.05.259. The Alaska Supreme Court clarified the scope of this rule in its decision in this case. It held that AS 16.05.259 and *Eluska* both prevent an individual from justifying hunting or fishing when not permitted by law by claiming subsistence use, but neither prevent a defendant from challenging the law under which he or she was charged. Pet. App. 36. Thus, a rural resident charged in state court with violating a state law could defend by claiming that the law was invalid as applied to him because ANILCA preempts it. The Alaska Supreme Court found in this case that ANILCA does not preempt the state spotlighting ban, Pet. App. 12, so Mr. Totemoff's challenge to the application of the regulation to himself was unsuccessful.

III. THE COURT SHOULD CONSIDER THE ISSUE OF WHETHER "PUBLIC LANDS" IN ANILCA INCLUDE NAVIGABLE WATERS SUBJECT TO A FEDERAL RESERVED WATER RIGHT BY GRANTING THE STATE'S PETITION FOR CERTIORARI IN *STATE V. BABBITT*, NO. 95-1084.

The state agrees that the Alaska Supreme Court's decision below conflicts with *State v. Babbitt*, 72 F.3d 698,

and that this will create serious jurisdictional conflicts that will harm Alaskans. The state petitioned for certiorari on this issue in the *Babbitt* case. No. 95-1084. If the Court has denied that petition, it should grant Mr. Totemoff's petition on this issue alone.

CONCLUSION

The petition for a writ of certiorari should be denied, except as to the definition of "public lands."

Respectfully submitted,

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